JAMES D. MEYERS,	BEFORE THE
Appellant	MARYLAND
v.	STATE BOARD
ANNE ARUNDEL COUNTY BOARD OF EDUCATION	OF EDUCATION
Appellee.	Opinion No. 16-50

OPINION

INTRODUCTION

James D. Meyers, (Appellant) appeals the decision of the Anne Arundel County Board of Education (local board) upholding his suspension from his teaching position for three days without pay based on misconduct. We referred this case to the Office of Administrative Hearings (OAH) as required by COMAR 13A.01.05.07A(2).

On July 7, 2016, the Administrative Law Judge (ALJ) issued a proposed decision recommending that the State Board uphold the local board's suspension decision. The Appellant filed exceptions to the proposed decision and the local board responded. Oral argument before the State Board was held on December 5, 2016.

FACTUAL BACKGROUND

Appellant is a certified and tenured teacher for Anne Arundel County Public Schools (AACPS). At the time of the incident at issue, he was teaching English, media production, and journalism at Arundel High School (Arundel). He had taught full-time with AACPS for ten years, preceded by two years of part-time teaching. (T.154).

On August 19, 2014, the Appellant entered the classroom of another teacher, Erin K. Lange, to access an adjacent control room where supplies were stored. Ms. Lange was in her classroom preparing for the upcoming school year where she was talking to Ms. Melanie Page, a new teacher assigned to Arundel. When the Appellant exited the control room, he approached Ms. Lange and Ms. Page and used profanity while speaking to them. Several days later, Ms. Lange mentioned the interaction with the Appellant to Lindsay Morgan, a Right Start Advisor. Ms. Morgan later relayed the information to the assistant principal, who in turn reported it to the principal, Sharon Stratton. Ms. Stratton ordered the Appellant to leave the building and initiated an investigation of the incident.

Ms. Stratton directed the assistant principal to get written statements regarding the incident from Ms. Lange and Ms. Page. In her written statement, Ms. Lange recounted the interaction as follows:

> After letting himself into the control room he came into my classroom fully and asked if I had found my theater textbooks housed there. I told him I had but hadn't yet moved them out of

> the control room and asked if they were in his way, to which he said yes and to "get [my] shit out." He then started moving the boxes of books himself. He then interrupted us again to talk to me (I can't recall what about) and looked at Melanie. She held out her hand and introduced herself to which Mr. Meyers said "what the f*** are you doing here?" Melanie told him she worked here and he said "No, what the f*** are you doing working here? Don't you know you should only teach when you're old like me, as a community service. She [indicating me] is stuck here but doesn't even know she's here because she's f***ing high. She's so f***ing high all the time, it's the only way she gets by, she's f***ing stoned off her ass." He continued to tell both Melanie and I why we shouldn't be teachers and how only fools teach unless Melanie could find some "poor dumb rich f***" to marry her. He then went into the control room . . . .

Ms. Lang's statement also contained information about the Appellant's use of profanity in other instances. Ms. Page explained the interaction in her written statement as follows:

> Denny Meyers came into the room to talk about the theater class and give [Ms. Lange] textbooks. He looked at me and asked "who the f*** are you?" I introduced myself. He asked "What the *** are you doing here? How old are you?" I responded with 24. He told me I was crazy and I needed to go live my life and go out and party. He pointed to Erin and I don't recall the exact words but mentioned she was so high she doesn't even know where she is.

The case was forwarded to the AACPS Office of Investigations where Shelly L. Powell, an investigator, conducted the investigation. Ms. Powell interviewed four teachers, which included Ms. Lange, Ms. Page, Ms. Morgan, and Appellant's co-teacher, Ms. Thorne; the Appellant; the principal; the assistant principal and two students. Ms. Powell had the written statements of Ms. Lange and Ms. Page. Ms. Powell concluded that the Appellant used inappropriate language and made defamatory comments about his peers, thereby creating an uncomfortable environment. Ms. Powell did not find sufficient evidence that the Appellant did or said anything to the students to make them uncomfortable. (Investigation Report).

By letter dated November 7, 2014, the Deputy Superintendent advised the Appellant of a pre-discipline conference to be held with Alex Szachnowicz, Chief Operating Officer acting as the Superintendent's Designee, and Janice Haberlein, Acting Director of School Performance. The letter stated the following:

> The purpose of this conference is to review the results of the investigation regarding allegations that you use inappropriate language in general conversation with co-workers, to include the word "f***," on a regular basis. You are also accused of making defamatory and improper remarks to your peers. Furthermore, your lack of physical boundaries and frequent touching with co-workers makes others uncomfortable.

(Liverman Letter). The pre-discipline conference took place on November 19, 2014.

By letter dated December 9, 2014, the Superintendent notified the Appellant that he was recommending a three day suspension without pay for misconduct in office. The Superintendent stated that Appellant had "used inappropriate language and made defamatory comments to [his] peers, creating an uncomfortable environment for them." He stated that Appellant's conduct was "inconsistent with, and contrary to, the standards set for Anne Arundel County Public Schools employees as established in the Employee Ethics section of the Anne Arundel County Public Schools Handbook." (Arlotto Letter).

The Superintendent also noted the following admonishments that are contained in the Appellant's employment record:

- September 2005 counseling letter for using inappropriate and/or offensive language when addressing students;
- May 2006 counseling letter for leaving class unattended and for failing to report to assigned duty daily and on time;
- November 2006 counseling letter for improper fundraising activities, lack of rigorous instructional techniques; and failure to maintain professionalism in the performance of duties, including conversations in the main office;
- April 2007 counseling letter for not abiding by special education documentation guidelines;
- May 2007 warning letter for failure to timely report to mandatory faculty training session and for lack of attention once there;
- August 2007 warning letter for improper communications with students and parents;
- April 2008 warning letter for failure to follow prescribed procedures for reporting an accident which caused a student physical harm;
- August 2008 warning letter for failure to report to work;
- April 2013 formal reprimand for making racially insensitive remarks to a student and for regularly speaking inappropriately and offensively to students. The reprimand directed the appellant to complete a cultural sensitivity training;
- October 2013 counseling letter for use of profane language in the presence of students; and
- March 2014 counseling letter for providing students with keys to unauthorized location within the school.

Id. Appellant's employment history also includes an August 2012 summary of expectations, which included the expectation that the Appellant "use appropriate and culturally proficient language at all times.[1] (Personnel Record).

Appellant requested a hearing before the local board pursuant to §6-202 of the Education Article. (Wright Letter, 12/9/14). The matter was assigned to Hearing Examiner Barbara Taylor, Esq. Hearing Examiner Taylor conducted an evidentiary hearing on April 30, 2015. At the hearing, Ms. Stratton, Ms. Powell, and Mr. Szachnowicz testified on behalf of the

[1] We note here that the school system conceded that counseling letters are not disciplinary in nature and are used by the school system only to advise employees of expectations. (T. 9). This is in contrast to warning letters and reprimands which are part of the progressive discipline process.

Superintendent. Appellant was represented by counsel and testified on his own behalf. No other witnesses were called.

On July 17, 2015, Ms. Taylor issued her Report and Recommendation, in which she granted in part and denied in part the Appellant's appeal. She recommended that (1) the Superintendent's finding of misconduct based on defamatory comments be reversed; (2) that the Superintendent's finding of misconduct for inappropriate language be affirmed; and (3) that in the scheme of progressive discipline, the Superintendent reconsider the penalty to be imposed.

The local board heard oral argument on November 4, 2015. On November 18, 2015, the local board adopted Hearing Examiner Taylor's recommendations as to the misconduct and upheld only a finding that the Appellant had engaged in misconduct for use of inappropriate language. The local board found the three day suspension without pay to be fair and reasonable, and supported by the record.

The Appellant timely appealed to the State Board, which referred the matter to the Office of Administrative Hearings. On April 11, 2016, the ALJ denied the local board's motion for summary affirmance. On April 12, 2016, the ALJ conducted a hearing during which the parties relied on the testimony of the witnesses and documentary evidence presented at the evidentiary hearing before Hearing Examiner Taylor.

On July 7, 2016, the ALJ issued a proposed decision recommending that the State Board uphold the local board's suspension decision based on misconduct. The ALJ concluded that (1) the written statements of Ms. Lange and Ms. Page were competent, reliable and probative, and, thus, admissible as evidence in the case despite the hearsay nature of statements; (2) Appellant's use of the word "f***" twice when addressing Ms. Page on August 19, 2014 constituted misconduct; and (3) concepts of progressive discipline were considered and a three day suspension without pay was an appropriate sanction.

Appellant filed exceptions to the proposed decision and the local board responded. Oral argument was held on December 5, 2016.

STANDARD OF REVIEW

Because this appeal involves the suspension of a certificated employee pursuant to §6-202 of the Education Article, the State Board exercises its independent judgment on the record before it in determining whether to sustain the suspension. COMAR 13A.01.05.05F(1) & F(3). The local board has the burden to prove by a preponderance of the evidence that the suspension should be sustained. COMAR 13A.01.05.05F(3).

The State Board referred this case to OAH for proposed findings of fact and conclusions of law by an ALJ. In such cases, the State Board may affirm, reverse, modify or remand the ALJ's proposed decision. The State Board's final decision, however, must identify and state reasons for any changes, modifications, or amendments to the proposed decision. *See* Md. Code Ann., State Gov't §10-216.

LEGAL ANALYSIS

Appellant raises several exceptions to the ALJ's proposed decision which we shall address in turn.

De Novo Standard of Review

This is an appeal of a teacher suspension decision of the local board which the State Board reviews *de novo*. COMAR 13A.01.05.05F(1). It is not entirely clear from the exceptions what issue the Appellant seeks to raise, if any, regarding the standard of review. (Exceptions ¶¶ 1 & 2). Nonetheless, we will address *de novo* review generally as it pertains to this type of case. As we explained in *Sullivan v. Montgomery County Bd. of Educ*., MSBE Op. No. 14-51 (2014), *de novo* review in an appeal before the State Board does not mean that an entirely new record must be created before the ALJ. Rather, it means that the State Board gives no deference to the factual or legal conclusions reached by the local board. *Id*. Instead, the Board exercises its independent judgment on the record before it in determining whether to sustain the suspension. COMAR 13A.01.05.05F(3).

In this case, the ALJ correctly stated the *de novo* nature of the appeal and the standard of review as follows:

> The standard of review for certificated employee suspension actions is a *de novo* review by the State Board. COMAR 13A.01.05.05F(1). The Local Board has the burden of production and persuasion in this case; the standard of proof is by a preponderance of the evidence. COMAR 13A.01.05.05F(3). The State Board shall exercise its independent judgment on the record before it in determining whether to sustain the suspension and may, in its discretion, modify a penalty imposed. COMAR 13A.01.05.05F(2) & (4).

Reliance on Hearsay

The Superintendent did not call Ms. Lange or Ms. Page as witnesses at the local board hearing and they did not testify about the incident with the Appellant. Rather, the Superintendent introduced the teachers' written statements as evidence of Appellant's conduct. The ALJ relied upon these statements in reaching his recommendation in the Proposed Decision. The Appellant maintains that the ALJ's reliance on the written statements was improper because the statements are hearsay, meaning that they are statements made outside of the hearing that were introduced as evidence to prove the truth of the matters asserted therein.

It is well settled that the rules of evidence are generally relaxed in administrative proceedings. *Travers v. Baltimore Police Dep't*, 115 Md. App. 395, 408 (1996). Thus, evidence, including hearsay, that may be inadmissible in a judicial proceeding, is not per se inadmissible in an administrative one. *Id*. *See also* Md. Code Ann., State Gov't §10-213 and COMAR 28.02.01 ("Evidence may not be excluded solely on the basis that it is hearsay."). The State Board has followed this approach. *See*, e.g. *Crosier v. Prince George's County Bd. of Educ*., MSBE Op. No 01-01 (2001); *Farver v. Carroll County Bd. of Educ*., MSBE Op. No. 99-42 (1999). To be admissible, however, the hearsay must be credible and probative. *Travers* at 412. If the hearsay is found to be credible and of sufficient probative force, it may even form the

sole basis for the agency's decision. *Redding v. Bd. of County Comm'rs for Prince George's County*, 263 Md. 94, 110-111 (1971).

The Appellant likens this case to *Kade v. Charles H. Hickey School*, 80 Md. App. 721 (1989), for the notion that the ALJ's assessment about the admissibility of the evidence demonstrated a failure to "observe the basic rules of fundamental fairness as to parties appearing before [him]." In *Kade*, a State agency employee was suspended based upon the written statements of his co-workers and students at the school. The hearing officer admitted the statements of two State agency employees who witnessed the appellant yell and use profanity. The appellant testified that one of the witnesses was the first aggressor, that he did not use profane language, and that the second witness was not within earshot of the conversation and, thus, could not have knowledge of the incident.

The *Kade* Court found that there was no indication that the hearsay evidence was reliable, credible or competent. It noted that the employee statements were not under oath and did not reflect how they were obtained. It further noted that the student statements were not sworn or dated, did not give any indication of the circumstances under which they were given, and that there was no evidence of the age of the students or that they were competent witnesses to the incident. *Id*. at 727-728.

This case is distinguishable from *Kade*. As explained by the ALJ:

> Here, the Appellant's reliance on *Kade* is misplaced. Ms. Powell testified at length before the Hearing Examiner as to how statements from Ms. Lange and Ms. Page were obtained, and she was subject to cross-examination. The Appellant challenged Ms. Lange's motives, but had no similar challenge to Ms. Page's motives as she was a newly-hired teacher whose statements were limited to the specific event of her first encounter with the Appellant. Her version and Ms. Lange's version of what the Appellant said and when he said it are consistent. The age, experience, and position of both Ms. Lange and Ms. Page are part of the record, and their handwritten statements are dated and signed. Importantly, the Appellant's version of events is not "diametrically opposed" to theirs, as was the case in *Kade*. Instead, the Appellant concedes that he may have said "f***" but does not remember how many times, that he may have said it once or twice, but more than that would be an exaggeration.

(Proposed Decision at 11-12). The ALJ further explained that the statements are the type of evidence "that reasonable and prudent individuals commonly accept in the conduct of their affairs." *Id*. In addition, Hearing Examiner Taylor noted that no evidence was presented to suggest that Ms. Lange and Ms. Page were untrustworthy, and, unlike *Kade*, the evidence in the case also consisted of Ms. Powell's investigation report and findings, in which Ms. Powell found the verbal recounting of the events by Ms. Lange and Ms. Page to be essentially the same as their written statements. (Hearing Examiner Report at 12-13).

Although the Appellant disagrees with the ALJ's assessment of competency and reliability of the statements, we do not. The issue here is not whether or not the Superintendent could have called Ms. Page and Ms. Lange as witnesses. Rather, given that they did not testify,

are their statements competent and reliable. In our view, for the reasons stated by the ALJ, there was sufficient basis to rely on the statements.

Misconduct in Office

Appellant maintains that the ALJ erred in finding that the Appellant engaged in misconduct by using profanity during his exchange with Ms. Page and Ms. Lange.

As the ALJ pointed out, what constitutes misconduct in office is not set forth in the Education Article or State Board regulation. In prior cases, we have looked to several court decisions to guide us in determining the parameters of misconduct. *See Gwin v. Baltimore City Bd. of Sch. Comm'rs*, MSBE Op. No. 12-19 (2012); *McSwain v. Howard County Bd. of Educ*., MSBE Op. No. 09-07 (2009). We do so again here.

In *Resetar v. State Bd. of Educ*., 284 Md. 537, 560-561 (1979), the Court of Appeals, interpreted the term "misconduct," as used in the educational arena, as follows:

> The word is sufficiently comprehensive to include misfeasance as well as malfeasance, and as applied to professional people it includes unprofessional acts even though such acts are not inherently wrongful. Whether a particular course of conduct will be regarded as misconduct is to be determined from the nature of the conduct and not from its consequences.

The Court also noted that the teacher's conduct must bear on the teacher's fitness to teach in order to constitute misconduct. *Resetar*, 284 Md. 561. *See also Kinsey v. Montgomery County Bd. of Educ*., 5 Op. MSBE 287, 288 (1989) (To constitute "misconduct in office" a teacher must engage in unprofessional conduct "which bears upon a teacher's fitness to teach" such that it "undermines his future classroom performance and overall impact on his students.").

In *Public Service Commission v. Wilson*, 389 Md. 27 (2005), the Court of Appeals concluded that:

> The term "misconduct," . . . means a transgression of some established rule or policy of the employer, the commission of a forbidden act, a dereliction of duty, or a course of wrongful conduct committed by an employee, within the scope of his employment relationship, during hours of employment, or on the employer's premises.

Id. at 77, citing *Department of Labor, Licensing, and Regulations v. Hider*, 349 Md. 85 (1988). The Court also made clear that the person's conduct need not be an intentional wrongdoing. *Id*., 389 Md. at 76-77.

With this in mind, we turn to the record in this case to determine whether the ALJ properly concluded that the local board proved misconduct by a preponderance of the evidence.

There are various expectations for employees set by AACPS that are contained in the AACPS Employee Handbook (Handbook). The Employee Ethics section of the Handbook provides that "[a]ll employees will treat colleagues in a dignified manner and ensure equitable treatment for all employees." (Handbook Excerpt). The Employee Responsibilities section of the Handbook provides, in relevant part, that "[p]roper and respectful language should be used in

the workplace at all times, and everyday conduct should convey messages of respect, honesty, courtesy, kindness, and consideration." *Id*. Employees are expected to comply with the Handbook provisions.

The principal, Ms. Stratton, also set certain expectations of conduct and behavior. She testified that she spoke with the Appellant on many occasions about communicating properly with students and employees, and also that she spoke with him about maintaining professionalism at all times, including in his conversations. (T.19, 24). In addition, she had previously issued to the Appellant a November 2006 counseling letter about maintaining professionalism in the performance of his duties, including in conversations in the main office, and a written document in August 2012, advising him to "use appropriate and culturally proficient language at all times." (Personnel Record).

The ALJ found that the Appellant used the word "f***" twice when addressing Ms. Page on August 19, 2014. (Proposed Decision at 12). He further found that use of such language was a violation of the AACPS Employee Handbook and the standards expected of teachers. (*Id*. at 15). In concluding that the Appellant had committed misconduct, the ALJ stated,

> The record suggests in ample supply that the Appellant's supervisors tried repeatedly to stem the Appellant's use of coarse language and to communicate to him that such language was unacceptable and unprofessional. His use of coarse language, despite repeated attempts to correct it, was a deliberate failure to abide by the standards of professionalism expected by his superiors.

(Proposed Decision at 14). Based on the totality of the evidence in the record, including the written statements of Ms. Page and Ms. Lange, we do not disagree with the ALJ's conclusion that the Appellant committed misconduct. We note further that the Appellant's use of profanity bears on his fitness to teach because it undermines the administration's confidence that the Appellant has proper judgment to appropriately communicate with others in the school environment. The Appellant could potentially speak in this manner in the presence of students or be overheard by them without his knowledge.

Appellant maintains that school staff, including Ms. Lange, regularly spoke to him using profanity. He also claims that neither Ms. Lange nor Ms. Page were offended by his statements. Such claims do not persuade us that the Appellant did not engage in misconduct on August 19, 2014. It is the employer's expectation of conduct that is at issue. The evidence shows that the expectation was that the Appellant use appropriate communications at all times and treat colleagues in a dignified manner.

Progressive Discipline

The Appellant argues that the penalty of a three day suspension was too harsh and was not consistent with progressive discipline. He suggests instead that a verbal warning, warning letter, or reprimand would have been more appropriate. The Appellant points out that the counseling letters contained in his personnel record are not disciplinary in nature, a fact conceded to by the school system. Hearing Examiner Taylor noted that Appellant's disciplinary history contained no verbal warnings, warning letters, or reprimands regarding use of inappropriate and/or offensive language in interactions with colleagues, and recommended that

the local board reconsider the severity of the penalty. (Hearing Examiner Report at 13). The Appellant also points out that the superintendent's initial recommendation of a three day suspension was based on two charges (inappropriate language and defamatory comments), yet only one charge was sustained, therefore a lesser penalty should have been imposed.

The State Board's broad powers include the power to modify a penalty imposed on school system personnel by a local board. COMAR 13A.01.05.05F(4); *Board of Educ. of Howard County v. McCrumb*, 52 Ms. App. 507, 514 (1982). It is within this Board's discretion to decide the appropriate penalty to impose here for misconduct.

The record in this case is replete with instances in which the Appellant was put on notice that he engaged in inappropriate communications in the school setting, including use of profanity. Even though the counseling letters were not disciplinary in nature, they still placed the Appellant on notice of his improper behavior and counseled against it. The Appellant had also received one prior warning letter and a reprimand for related behavior, which are disciplinary in nature. Although the Appellant claims that the prior admonishments were for use of inappropriate language in front of students and not colleagues, it is all related to the manner in which the Appellant communicates with others in the school setting. Moreover, Ms. Stratton had previously advised the Appellant in writing to "use appropriate and culturally proficient language at all times" and to maintain professionalism in discharging his responsibilities, including in his conversations. (*See* Personnel Record). She also spoke to the Appellant on numerous occasions about his use of inappropriate language with both school personnel and students. (T. 19, 24).

As the ALJ stated:

> The Appellant's suggestion that progressive discipline was not used here is absurd. He suggests that he was somehow unaware of the potential consequences of his conduct because no one told him not to use profanity in the presence of adults. Again he ignores that past, and the great many times his supervisors have communicated their expectations to him that he not use profanity.

(Proposed Decision at 15). Given this teacher's history and the facts in this case, we find that a three day suspension without pay was a minimal penalty and certainly not an unreasonable one.

CONCLUSION

For all of the foregoing reasons, we adopt the ALJ's proposed decision. We find that the Appellant committed misconduct based on his use of inappropriate language with Ms. Lange and Ms. Page, and that a three day suspension without pay was not unreasonable.

Signatures on File:

_____
Andrew R. Smarick
President

_____
Chester E. Finn, Jr.
Vice President

_____
Michele Jenkins Guyton

_____
Laurie Halverson

_____
Stephanie R. Iszard

_____
Rose Maria Li

_____
Barbara J. Shreeve

_____
Madhu Sidhu

_____
Guffrie M. Smith, Jr.

_____
Laura Weeldreyer

Absent: Jannette O'Neill González

December 5, 2016